IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 53 of 2004
With
CRIMINAL APPEAL No. 82 of 2004
With
CRIMINAL APPEAL No. 379 of 2004

For Approval and Signature:

HONOURABLE MR.JUSTICE AKIL KURESHI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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DINESHBHAI HIRABHAI VAGHARI - Appellant(s)
Versus
STATE OF GUJARAT & 1 - Opponent(s)

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Appearance :

CR.A Nos. 53/2004 and 82/2004
THROUGH JAIL for Appellant(s) : 1,MS ROOPAL R PATEL for Appellant(s) : 1,
MS HANSA PUNANI, APP for Opponent(s) : 1,

CR.A No.379/2004
MR AM PAREKH for Appellant(s) : 1,
MS HANSA PUNANI, APP for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE AKIL KURESHI

Date : 26/12/2007

ORAL JUDGMENT

1. These appeals arise out of common judgement and order dated 17.11.2003 passed by learned Additional Sessions Judge, Surat in Sessions Case Nos. 177/2001 and 188/2002.

2. The appellants were original accused Nos. 1,2 and 4 who were charged with offences punishable under Sections 395 and 397 of the Indian Penal Code. One Galabhai Melabhai Solanki, accused No.3 had jumped the bail and was not available for trial.

3. By the impugned judgement, learned Additional Sessions Judge convicted the appellants herein for offences punishable under Sections 395, 397 and 342 of the Indian Penal Code. They were sentenced to undergo rigorous imprisonment for seven years for offence punishable under Section 395 of the Indian Penal Code and seven years for offence punishable under Section 397 of the Indian Penal Code and one year for offence punishable under Section 342 of the Indian Penal Code. They were also ordered to pay fine.

4. As per the prosecution on 10.6.2001 between 12:30 to 2:30 at night, accused along with other persons armed with deadly weapons went to the house of the complainant Rashmiben which was situated in the field in the Sim of village

Jarpan Taluka Mandvi. They by showing knife, robbed them of valuable articles such as silver and gold ornaments, a moped and some clothes. They had thereby committed offences punishable under Sections 395, 397 and 343 of the Indian Penal Code and had looted total cash and valuables of Rs. 43,740/-.

5. Rashmiben Chogdabhai Gamit-PW1 was examined at exh.13. In her deposition, she stated that she was a Primary School Teacher. When the incident took place she was residing at village Jarpan with his son Dilip and her mother. There being vacation, her daughter and son-in-law had also come to stay with her. The incident took place at 1:30 on the night of 9.6.2001. She was sleeping inside the house with her son Dilip. Her mother and grandmother were sleeping in a house next to her house. Her daughter and son-in-law were sleeping outside near the house. Upon hearing her mother's shout, she opened the door. Two persons rushed inside, caught her by Neck and put a knife against her neck and threatened that she would be killed if she shouted. Three persons who were standing outside brought her Mother in the room where she was standing. Two more people brought her daughter and son-in-law. Her son was ordered to stay whee he was. They were all asked to sleep covering their heads. She however, took a peek every now and then. These persons used to ask her

repeatedly where she has kept the ornaments. They had disturbed everything in the kitchen and found four gold rings which she had kept in an old powder box. They took away the rings. They also found from some boxes her gold pendent and gold bangles and gold chain. They stayed in the house for about one and half hours. They were thereafter, taken in the front room. They were thereafter locked up in the front room and both the doors were locked from outside. While going, the appellants threatened them that if they would shout, they would return and beat them. They had also taken away her Scooty. Her son-in-law thereafter, with great difficulty broke open the door. At 4 O' clock they went to the police station to lodge the complaint. She stated that she was called for the Test Identification Parade and she had identified two of the three accused person before the Court. She identified all the three accused persons as belonging to the group of persons who had committed the crime.

5.1 In the cross examination, upon being suggested that offences took place in the darkness, she stated that there was light. She however, admitted that she could not state as to which accused was carrying which weapon.

6. Rajeshbhai Chandubhai-PW2 was examined at exh.15. He also gave a similar account of the

incident. He stated that he along with his wife Vimal was sleeping outside the house. Her mother-in-law and brother-in-law were sleeping inside the house. Grandmother was sleeping in the next house. He heard that somebody was knocking the door and pet dogs had started barking. He therefore, awoke. Some persons had entered the house from the back door. They opened the front door and took him and his wife inside and asked them to lie down covering themselves with mattresses. They had inquired with their mother-in-law about gold and other valuable articles. His mother-in-law was also carried to another room. They had found ornaments from the box kept in the kitchen which they had taken away. Witness identified the accused as part of the group who had committed the crime. He had identified two of the three accused during the Test Identification Parade. He however, could not specify exact role of each accused.

6.1 In the cross examination, when asked whether it was dark when the incident took place, he stated that the assailants closed the door and windows and put the lights on. He stated that during this period the lights had not got disconnected. He admitted that he could not state as to which accused was carrying which weapon.

7. Vimalben Rajeshbhai Patel-PW5 was examined at exh.18. She also gave similar account of the incident. She stated that she had gone to stay at her mother's house with her husband. At night she was sleeping outside with her husband. Others were sleeping inside the house. They got up hearing the dogs bark. Some persons had entered the house and had opened the front door and had forcibly taken her and her husband inside the house. She also narrated the manner in which the accused had found some ornaments and cash. She had identified two out of the three accused during the Test Identification Parade. She identified all the accused before the Court also.

8. Kazi Makshood Abdul Rashid-PW7 was examined at exh.21. He was the Panch witness in whose presence Test Identification Parade was carried out. He had supported the prosecution and narrated the manner in which Test Identification Parade was conducted. He had produced the Panchnama of Test Identification Parade at exh.22.

9. Narenkumar Dasariyabhai Gamit-PW13 was examined at exh.32. He was the Mamlatdar who had conducted the Test Identification Parade. He had described the manner in which he collected about 12 dummies and mixed the three accused for identification. He stated that Rashmiben-PW1,

Rajeshbhai-PW2 and Vimalben-PW5 had identified the accused Jasubhai alias Jasiyo Gandabhai, Galabhai Melabhai Solanki(absconding accused) and Akrambhai Ahmedmiya.

10. Prosecution also examined Maulesh Bhanushankar Joshi-PW14 at exh.34. He was the Investigating Officer. He narrated the manner in which identification was carried out and attempt was also made to show that some of the gold in solid form from the ornaments stolen by the accused was traced from different goldsmith. It was also attempted to point out that from the scene of offence, some stubs of bidies were found.

11. Dr. Sashikantbhai Shivajibhai Chaudhary-PW6 was examined at exh.19. He had opined that Dineshbhai Hirabhai was found to be a chain smoker and was suffering from cough on account of the same.

12. From the evidence on record, it can be seen that so far as incident is concerned there is absolutely no doubt or dispute possible. In the night hours in the house of the complainant, some persons had entered with deadly weapons and threatened the inmates of house with dire consequences. They were forcibly confined inside the house. House was ransacked and valuable articles such as gold and silver ornaments, watches, cash and even Scooty belonging to the

complainant was stolen. This has been established by the prosecution by number of eyewitnesses. The question is whether the appellants herein were the part of the said group and if yes what offence did they commit. Insofar as involvement of the appellants is concerned, it is clearly established on record. Rashmiben-PW1 in her deposition had before the Court identified all the accused persons as belonging to the group of persons who had committed the offence. Two out of three accused persons were offered to identification during the Test Identification Parade by the Executive Magistrate. PW1 had successfully identified these accused. So was the case with Rajeshbhai-PW2, son-in-law of the complainant and Vimal-PW5, daughter of the complainant. All the three witnesses had identified the accused before the Court as well as had successfully identified two out of three accused who were offered for identification during Test Identification Parade.

13. It is true that the accused were not known to the witnesses before hand. However, there was enough evidence to suggest that they had sufficient opportunity to identify them later on. Rashmiben -PW1 clearly stated that when the incident took place it was not dark because lights were on. PW2 also when asked whether it was dark or not stated that accused had closed

the doors and windows of the house and had put the lights on and during the entire incident, lights had not got disconnected. These witnesses have stated that whole incident took more than one hour. They therefore, had sufficient opportunity to see the accused in proper light. Significantly, the house was located on a field and not in a residential society. It was thus totally isolated. The accused were trying to search for gold and other ornaments and cash from the house which was kept hidden. As per the witnesses, they had closed the doors and windows and were embolden enough to put the lights on. All these would establish that witnesses had more than sufficient opportunity to see the accused in sufficient light. In fact, with the complainant they had entered into conversation. She was forced to disclose where the cash and ornaments were hidden. These witnesses had no previous enmity with the accused persons. They had no reason to falsely involve them or implicate them in the crime. Their deposition also match inter-se. No major contradictions have come-forth. When given an opportunity during Test Identification Parade, they identified the accused.

14. Considering all these aspects of the matter, I find no difficulty in holding that the appellants were rightly held guilty of having committed robbery in the house of the

complainant. Their conviction under Section 395 of the Indian Penal Code was therefore, perfectly justified.

15. The question is can the appellants be convicted under Section 397 of the Indian Penal Code. It is by now well settled that Section 397 of the Indian Penal Code lays down no separate offence but only provides for an aggravated form of robbery and dacoity and prescribes a minimum sentence of seven years. In a judgement reported in 1996(2) GLR 251, it was held that Section 397 of the Indian Penal Code cannot be applied vicariously. Bombay High Court has also taken a similar view in case of **Willson Abraham Chouriappa v. State of Maharashtra** reported in 1995 Cri.L.J. 4042.

16. Views of different High Courts in this regard were considered by the Apex Court in the case of **Phool Kumar v. Delhi Administration** reported in AIR Supreme Court 905 and the Apex Court approved the view that under Section 397 of the Indian Penal Code the term used is offender and it is rightly held by several High Courts that same is confined to offender who uses any deadly weapon. The use of a deadly weapon by one offender at the time of committing robbery cannot attract Section 397 for imposition of the minimum punishment on another offender who had not used any deadly weapon. The term used

however was explained as to include even the case where offender while committing offence of robbery is armed with a deadly weapon which was within the vision of the victim so as to be capable of creating a terror in his mind.

17. Learned APP Ms. Punani however, placed reliance on the decision of the Apex Court in the case of **Ashfaq v. State(Govt. Of NCT of Delhi)** reported in (2004) 3 Supreme Court Cases 116 to submit that if the weapon with which the offender was armed was within the vision of victim so as to capable of creating terror in the mind of th victim, it was sufficient to satisfy the word “uses” for the purposes of Section 397. Insofar as above proposition is concerned, same is well laid down by the Apex Court. The question is whether Section 397 of the Indian Penal Code can be applied against all persons in the event when only one of the accused was carrying a deadly weapon while committing the robbery. In this regard observations of the Apex Court in the case of **Ashfaq**(supra) are significant and are as follows.

“9. The further plea that one accused alone, was in any event in possession of the country-made pistol and the others could not have been vicariously held liable under S. 397, I.P.C. with the assistance of S. 34, I.P.C. overlooks the other vital facts on record found by the Courts below that the others were also armed

with and used their knives and that knife is equally a deadly weapon, for purposes of S. 397, I.P.C. The decision of the Division Bench of the Bombay High Court relied upon turned on the peculiar facts found as to the nature of the weapon held by the accused therein and the nature of injuries caused and the same does not support the stand taken on behalf of the appellants in this case. The provisions of S. 397, does not create any new substantive offence as such but merely serves as complementary to Ss. 392 and 395 by regulating the punishment already provided for dacoity by fixing a minimum term of imprisonment when the dacoity committed was found attendant upon certain aggravating circumstances viz., use of a deadly weapon, or causing of grievous hurt or attempting to cause death or grievous hurt. For that reason, no doubt the provision postulates only the individual act of the accused to be relevant to attract S. 397, I.P.C. and thereby inevitably negates the use of the principle of constructive or vicarious liability engrafted in S. 34, I.P.C. Consequently, the challenge made to the conviction under S. 397 even after excluding the applicability of S. 34, I.P.C. does not merit countenance, for the reason that each one of the accused in this case were said to have been wielding a deadly weapon of their own, and thereby squarely fulfilled the ingredients of S. 397, I.P.C., dehors any reference to S.34, I.P.C."

18. With the legal position clarified by the Apex Court in the above judgement, if one reverts to the facts of this case, it would be found that all the eyewitnesses i.e. Rashmiben-PW1, Rajeshbhai-PW2 and Vimalben-PW5 clearly stated that they were unable to state as to which accused was carrying which weapon. Admittedly, in the present case, no hurt simple or grievous was caused to anyone. To bring home the charge,

under Section 397 of the Indian Penal Code against any of the accused therefore, prosecution had to establish that particular accused had used a deadly weapon as explained by the Apex Court in judgements referred here-in-above. For the said purpose, the prosecution at-least had to establish that a particular accused was carrying a particular deadly weapon. Same is admittedly not being done. Allegations in this regard are general. It is true that some of the members of the group were carrying deadly weapon. However, witnesses have not stated about any of the accused carrying any deadly weapon. The fact therefore, remains that these accused cannot be convicted under Section 397 of the Indian Penal Code. Their conviction therefore, under the said Section is set aside.

19. The appellants were sentenced to seven years of rigorous imprisonment for offences punishable under Section 395 of the Indian Penal Code and one year under Section 342 of the Indian Penal Code and the sentences were made concurrent.

20. The appellants have undergone more than six and half years of imprisonment. Their sentence under Section 395 of the Indian Penal Code is therefore, reduced to one already undergone. They will be released if not required in any other offence.

21. The appeals succeed in part. Conviction of the appellants under Section 395 and 342 of the Indian Penal Code is confirmed. Sentence however, is reduced to one already undergone. Conviction under Section 397 of the Indian Penal Code is set aside.

(Akil Kureshi,J.)

(raghu)